

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2077

To be Argued by
ROBERT S. HAMMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
WILLIAM E. WRIGHT, :

Petitioner-Appellee, :

-against- :

HAROLD J. SMITH, Superintendent, :
etc., :

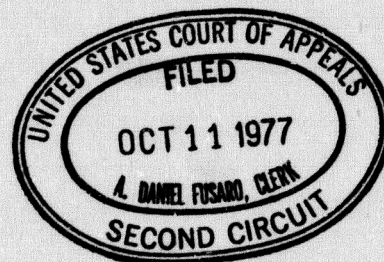
Respondent-Appellant. :
-----X

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Question Presented

Did the District Court err in holding that the trial judge's charge to the jury on the matter of petitioner's alibi defense shifted the burden of proof to petitioner and thereby resulted in a denial of due process of law?

Statement of the Case

This is an appeal from a judgment of the District Court for the Western District of New York (Curtin, J.) entered June 15, 1977, granting a writ of habeas corpus. The petitioner was ordered released from custody within sixty days unless proceedings were initiated by the Erie County District Attorney to retry him (51a).^{*} Petitioner has been released from custody.

On August 3, 1972, following a jury trial in Erie County Court, petitioner William E. Wright was convicted of robbery in the first and second degrees in violation of New York Penal Law §§ 160.15 and 160.10 respectively. He was sentenced to an indeterminate period of imprisonment of up to 25 years on the first degree robbery charge and up to 15 years on the second degree robbery charge, the terms to run concurrently. The Appellate Division, Fourth Department, reversed the conviction with respect to the sentence imposed, and upon remand to the Erie County Court, petitioner was resentenced in September 1973 to an indeterminate sentence of 0-15 years for the first degree robbery count and 0-7 years for the second

^{*} Numbers in parentheses followed by "a" refer to pages of the Appendix.

degree robbery count, the terms again to run concurrently. The New York State Court of Appeals denied leave to appeal (Nov. 5, 1973), whereupon petitioner initiated the instant proceeding.

The District Court sustained the petition on the basis that the trial court's instructions to the jury on petitioner's alibi defense improperly shifted the burden of proof to him (34-44a).*

The trial court had charged as follows:

"Now, the defendant in this case, in addition to pleading not guilty, has interposed a defense that is commonly known as an alibi. An alibi is a latin [sic] word meaning elsewhere, and when applied to a trial, or in this trial of a case, a trial such as this, it means that at the time of the alleged crime, said to be committed by defendant, that the defendant claims that he was someplace other than the scene of the crime. In this case, through two alibi witnesses, he maintains that he was in an apartment, not

* Petitioner's claims of impermissibly suggestive pre-trial identification procedures, double jeopardy and the trial judge's comments to the jury regarding the credibility of an alibi witnesses' testimony (21-22a) were denied in turn (23-28a; 28-30a; 30-31a).

far from the scene, if I recall correctly. She said, Ruth Kowles said she came out of 312 Perry Street, and that just outside, some thirty, or forty, or fifty feet from where she exited from 312 Perry Street, that she was robbed. Now, the defendant says, through the two alibi witnesses, that he was in fact not out of the house; that he lives at 344 Perry Street, a short distance from the scene, here, but that his physical condition was such that he couldn't run, and that he was in fact not out of the house. It's claimed by one of the alibi witnesses, that he was reading a -- reading to his wife from 4:30 to 5:00, and by the other alibi witness, I believe that he was reading from 4:30 to 5:30, and that he didn't, during this time, leave the house, and in fact, didn't leave the house at all between quarter after four and a quarter to eleven. Now, an alibi defense, if clearly -- clearly established by unsuspected, believable testimony, is the very best that an innocent man can make. No man can be in more than one place at one time. And, if therefore, the defendant was not at the scene of the alleged crime at the time when it is said to have been committed, he cannot be guilty of the commission of any of the crimes in this indictment. Now, you ascertain whether this alibi defense was interposed in good faith. This is your job here, or, whether it was a defense that was concocted and resorted to, in an attempt to clear a guilty man of the charge. You should examine not only the principal facts which the alibi witnesses testified to, but carefully examine all of the differences,

discrepancies, or contradictions, if there be any in the testimony of these alibi witnesses. You may consider the distances involved from the scene of the events, or, were these witnesses accurate, were they evasive; is there any common or mutual interest among the alibi witnesses, which interest might affect them to the extent of creating or helping to create a false alibi, or is their testimony prompted solely by a desire to assist in the true administration of justice. If, after careful analyzing on behalf of the defendant, the evidence which has been presented here, you find it is false or has been interposed here intentionally as false defense, such a finding of fact, may be considered by you as a circumstance bearing on the guilt or the innocence of the defendant. The jurors have a right, if they find as a fact, that a false defense has been intentionally interposed, to ask, what was the motive underlying the interposition of the false defense, was it, or was it not to escape the force of convincing circumstances, pointing to guilt. If you find that any such attempt has been made, you may consider that fact in determining the guilt or the innocence of this defendant. But, if on the other hand, you find that this was, that he was truly in that apartment, that he wasn't out on the street, that he, of course, if you find that he was in that apartment, and never left that apartment that apartment [sic] that afternoon, around 4:45, then you must find him not guilty.

"Now, this is a sharp issue of fact. It's left for your determination. ...

* * * *

"Counsel has made a request here that I tell you, if you have a -- if the alibi witnesses have created reasonable doubt in your mind as to whether or not the defendant committed the crimes charged here, you have a duty to acquit. Of course, that is true; if you have a doubt, if you have a doubt as to the guilt of the defendant, you are bound to resolve the doubt in favor of the defendant. I am sure that I told you that." (Trial Transcript at 287-291, 302-303).

The District Court faulted the State trial judge for failing to specifically charge that the prosecution bears the burden of persuasion with respect to the issue of alibi (38a); he ruled that the charge conveyed an impression that the defendant was obliged to establish his defense by credible evidence (38-40a); and he took exception to language suggesting that the defendant was obliged to affirmatively show his innocence (41-43a). He further held that these errors were not "harmless" and required the grant of relief to the petitioner (43-44a).

ARGUMENT

THE STATE TRIAL JUDGE'S CHARGE
TO THE JURY ON PETITIONER'S
ALIBI DEFENSE SATISFIED THE
CONSTITUTIONAL REQUIREMENTS OF
DUE PROCESS.

The District Court correctly stated that

"In this circuit, jury instructions in a state trial are normally a matter of state law and are not reviewable in a federal habeas corpus application unless there has been a showing that the alleged errors in the instruction were so serious as to deprive the petitioner of a federal constitutional right. United States ex rel. Smith v. Montanye, 505 F.2d 1355, 1359 (2d Cir. 1974), cert. denied, 423 U.S. 856 (1975). See also Cupp v. Naughten, 414 U.S. 141, 146 (1973). Federal habeas corpus is available to set aside a conviction only when the impropriety in the challenged jury instruction constitutes a 'clear denial of due process so as to render the trial fundamentally unfair.' Higgins v. Wainwright, 424 F.2d 177, 178 (5th Cir.), cert. denied, 400 U.S. 905 (1970), rehearing denied, 400 U.S. 1002 (1971), as referred to with approval in Lee v. Henderson, 342 F.Supp. 561, 563 (W.D.N.Y. 1972). See also United States ex rel. Smith v. Reincke, 239 F.Supp. 887, 894 (D.Conn.), aff'd, 354 F.2d 418 (2d Cir. 1965), cert. denied, 384 U.S. 993 (1966); United States ex rel. Winfield v. Casscles, 403 F.Supp. 956 (E.D.N.Y. 1975); United States ex rel. Bryant v. Benson, 373 F.Supp. 1180 (S.D. N.Y. 1974)." (32-33a).

However, we respectfully urge that this standard was misapplied to the instant case.

The District Court's contention that the trial court failed to instruct the jury properly with regard to the alibi defense is erroneous, due to its misplaced reliance on United States v. Marcus, 166 F. 2d 493 (3d Cir. 1948) and United States v. Booz, 451 F. 2d 719 (3d Cir. 1971), cert den., 414 U.S. 820 (1973).

In United States v. Marcus, supra, appellant successfully argued for reversal of the judgment because the trial court had refused to give any instructions on the subject of alibi. The trial court in the instant case did not fail to instruct the jury on the alibi defense. On the contrary, it devoted seven pages to the instructions. The charges to the jury in the case at bar are analogous to those deemed sufficient by the Marcus court, 166 F. 2d at 504:

"... if the jury's consideration of the alibi testimony leaves in the jury's mind a reasonable doubt as to the presence of the accused, then the government has not proved the guilt of the accused beyond a reasonable doubt."

Compare with the charge in this case:

"... if the alibi witnesses have created reasonable doubt in your mind as to whether or not the defendant committed the crimes charged here, you have a duty to acquit." Trial Transcript at 303.

To hold that these instructions differ significantly from those held by the Marcus court to satisfy the presumption of innocence of the accused, would be without justification. The trial court's explicit instruction to the jury that they have a duty to acquit if the alibi witnesses have created reasonable doubt in their minds is tantamount to an implicit statement that the government must bear the burden of proof with respect to the alibi issue.

Similarly, the court's statement in United States v. Booz, supra, 451 F. 2d at 723, that a "defendant is entitled to specific instructions on the burden of proof on alibi issues" was prompted by a trial court's jury charges which were blatantly more seriously deficient than those in the instant case. The Booz instructions with respect to the alibi were as follows:

"Obviously if he was at home he couldn't have been at the bank, and this is his alibi, if you call it that,

and if you believe that and the Government hasn't convinced you beyond a reasonable doubt that he was not home but instead of being at home was at the bank, why, then of course you should find in favor of the Government. In other words, the alibi has not been established and the Government has not proved to you beyond a reasonable doubt that he was not at home."

Thus, the Booz court never charged the jury with clear instructions with respect to the alibi issue, contrary to the situation presented here.

Moreover, the District Court should not have relied (33-36a) on cases where error was found in charges explicitly placing the burden of proof upon the defendant and not upon the prosecution. See United States v. Vigorito, 67 F. 2d 329, 330 (2d Cir. 1933); cert. den. 290 U.S. 705 (1934); Johnson v. Bennett, 386 F. 2d 677 (8th Cir. 1967); Stump v. Bennett, 398 F. 2d 111, 115 (8th Cir. 1968); Smith v. Smith, 454 F. 2d 572, 573 (5th Cir. 1971).

The District Court's conclusion that the words

"Now, an alibi defense, if clearly -- clearly established by unsuspected, believable testimony, is the very best that an innocent man can make."
(Trial Transcript p. 288).

tended to shift the burden of persuasion upon the petitioner results from an erroneous reading of the State cases. To begin with, far from being improper, under State law, nearly identical language was approved in People v. Lorez, 28 App. Div. 2d 726, 282 N.Y.S. 2d 680, 681 affd. 21 N Y 2d 733, 287 N.Y.S. 2d 883 (1967).

In People v. Anderson, 37 App. Div. 2d 728, 323 N.Y.S. 2d 882, 883 (2d Dept. 1971); People v. Johnson, 37 App. Div. 2d 733, 383 N.Y.S. 2d 880 (2d Dept. 1971) and People v. Chestnut, 42 App. Div. 2d 594, 345 N.Y.S. 2d 79 (2d Dept. 1973) the alibi instruction was, in fact, either explicitly or implicitly upheld.

As to the District Court's holding (40a), the supplemental charge tended to confuse the jury, one must weigh it against the respected instructions of the trial judge that the sole burden was on the prosecution, which was required to prove its case beyond a reasonable doubt. See Trial Transcript at pp. 269, 270, 271, 279, 296, 298 and 303. In the light of these repeated cautionary instructions, whatever error may have been committed was surely harmless, Chapman v. California, 386 U.S. 18 (1967).

In sum, the trial court never shifted the burden of proof of alibi to the petitioner. On the contrary, the Court merely instructed the jury to analyze the alibi defense in determining the guilt or the innocence of the defendant. The cautionary language of the Court did not shift the burden of proof, as in the above cited cases. The charge is identical in all material aspects to the charge upheld in Sullivan v. Scafati, 428 F. 2d 1023, 1029 (1st Cir. 1970), cert den., 400 U.S. 1001:

"Of this character is the defense usually called an alibi; that is, that the accused was elsewhere at the time the offense is alleged to have been committed. If this is true -- it being impossible that the accused should be in two places at the same time -- it is a fact inconsistent with that sought to be proved, and excludes its possibility.

"This defense of alibi is often a defense attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it, is to be subjected to a rigid scrutiny, because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defense, it is obvious, that all testimony, tending to show that

the accused was in another place at the time of the offense, is in direct conflict with that which tends to prove that he or they were at the place where the crime was committed, and actually committed it. In this conflict of evidence, whatever tends to support the one, tends in the same degree to rebut and overthrow the other, and it is for the jury to decide where the truth lies."

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD
BE REVERSED AND THE PETITION
DISMISSED.

Dated: New York, New York
September 9, 1977

Respectfully submitted,
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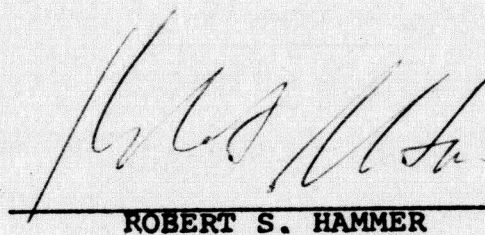
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* The assistance of Ms. Elise Hagouel, SUNY of Buffalo Law School, Class of 1978, and a Legal Aide in the Attorney General's office, is gratefully acknowledged.

The undersigned member of the bar of this
Court certifies that on September 9, 1977, 3 copies of the
annexed was duly mailed to

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Dated: New York, N. Y.
September 9, 1977



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